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SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1900.

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No. 20.

FRED STEARNS, as County Auditor of Aitkin County, Minnesota,

Plaintiff in Error,

vs.

STATE OF MINNESOTA, on relation of James N. Marr.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN,
Of Counsel.

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STATEMENT.

This cause was argued and submitted at the last term (No. 102) and was by order of the Court restored to the docket for reargument.

It is a writ of error from a final judgment of the supreme court of Minnesota, that being the highest court of the state. The opinion of the supreme

court of Minnesota is printed in the Transcript, pp. 58 to 70, and reported in 72 Minn., p. 200.

The question here is, whether a certain act of the legislature of Minnesota, Laws 1895, chap. 168, violates the obligation of certain contracts. Briefly stated said law provides that all lands heretofore or hereafter granted by the state of Minnesota, or the United States, or the territory of Minnesota, to any railroad company shall be assessed and taxed as other lands are taxed (except such as are actually used for railroad purposes); and the law also provides that said railroad company shall continue to pay taxes into the state treasury upon its gross earnings in the same manner and in the same amount as now required by law; all laws providing for the exemption of such lands or for their taxation in any special or different manner are repealed.

The contracts which we assert have been violated, are contained in Special Laws of Minnesota, chap. 8, March 3, 1865, and Special Laws of Minnesota, chap. 65, March 4, 1870. The first of these laws provides in brief that the lands granted by the state to aid in the construction of the Lake Superior and Mississippi Railroad shall be taxed in this manner, to-wit: that the railroad company shall pay into the treasury of the state annually 3 per cent. of the gross earnings of its railroad, and this payment shall be in full of all tax and assessment whatever. The special act of 1870 referred to applies the act of 1865 to the Northern Pacific Railroad Company, which had been incorporated in 1864 by the act of Congress of July 2, and which road had not then

been constructed through the state of Minnesota, and could not be so constructed under the congressional charter without the consent of the state.

The proposition held by the state court was that there was no contract because these laws of 1865 and 1870 were beyond the power of the state legislature to pass, being in conflict with the constitution of the state, adopted in 1858, Article IX, sections 1 and 3. 72 Minn. 220-224. These sections provide in brief that all taxes shall be as nearly equal as may be, and all property on which taxes are levied shall have a cash valuation and be equalized and uniform throughout the state; and that laws shall be passed taxing all moneys, credits and investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money.

The decision of the state court is, as we shall show, not conclusive upon this point. It is for this court to decide whether a law of the state violates the obligation of a contract; and this involves two inquiries, (a) whether there was a contract, (b) whether its obligation is violated.

For the proper understanding and presentation of this question a somewhat more detailed statement of the facts is necessary.

The constitution of the state was adopted in 1858, and Article IX, sections 1 and 3 read as follows:

> "Section 1. All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state."

"Section 3. Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property, according to its true value in money; but public burying grounds, public school houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, shall, by general laws, be exempt from taxation."

In 1865 the state was trustee under an act of Congress of certain land grants made by Congress to the state in trust to promote and secure the construction of certain lines of railroad, among others a railroad to extend from St. Paul on the Mississippi river to Lake Superior. The Lake Superior and Mississippi Railroad Company had been incorporated for this work, but had not entered on the construction, and it was at that time uncertain when the proposed road would be built or whether it would be built at all. The state, in order to induce and secure the construction of this road, passed chapter 8 Special Laws of 1865, which reads as follows:

Section 1. That whenever any lands heretofore or hereafter granted to the Lake Superior and Mississippi Railroad Company, to aid in the construction or completion of its road or branches shall be contracted to be sold, conveyed or leased by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year

succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but in enforcing a collection of the taxes thereon, the title or interest of the said company or of any trustee or mortgagee thereof shall be in no wise impaired or affected thereby, but the improvements thereon, and all the interest of the purchaser or lessee therein may and shall, in case of default of the payment of taxes upon such land, be sold to satisfy the same, and it shall be the duty of the proper officers to assess and collect such taxes in accordance with the general laws relating to the assessment and collection of taxes, and that the provisions of the several acts in relation to the taxation of the lands of said company so far as the mode of taxing such lands conflict with the provisions of this act, shall be and they are repealed. Provided, that said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the first day of March, in each and every year, pay into the treasury of the state, one per cent on the gross earnings of said railroad, the first payment to be made on the first day of March next, after thirty miles of said railroad shall be completed and in operation, and shall, during the seven years next ensuing, after the expiration of the three years aforesaid, pay into the treasury of this state on or before the first day of March of each and every year, two per cent of the gross earnings of said railroad, and shall, from and after the expiration of said seven years, on or before the first day of March, of each and every year, pay into the treasury of this state three per cent of the gross earnings of said railroad; and the payment of such *per centum* annually, as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the

treasurer of this state, on or before the first day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the governor of this state, or any other person appointed by law to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the governor or other authorized person shall knowingly or willingly swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the state the payment of the aforesaid *per centum*, it is hereby declared that the state shall have a lien upon the railroad of said company, and upon all the property, estate, and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the state shall take and have precedence of all demands, decrees and judgments against said company.

Sec. 2. That upon the filing by said company in the office of the secretary of state of a notification of its acceptance of this act the same shall become obligatory upon the state and upon said company, provided that said notification shall be given within sixty days.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved March 3, 1865.

In further explanation of this act it should be noted that eight days before it was passed the legislature passed an act, Ch. 2, Spl. Laws 1865, granting said congressional lands to the Lake Superior & Mississippi Company with terms as to taxation which did not prove acceptable (*State v. Luther*, 56 Minn. 158). The act we quote was passed in or-

der to secure acceptance of the grant and construction of the road by the proposed grantee.

The Lake Superior & Mississippi Company also accepted a state grant of swamp lands, which came under the terms as to taxation of the same act. It duly filed an acceptance of the act as therein required and constructed its railway in reliance thereon. Transcript, p.18. It has always continued to pay into the state treasury 3 per centum per annum of its gross earnings in compliance with the act. Trancript, p. 36. These facts were admitted on the trial as shown in the bill of exceptions. Transcript, pp. 54-55. It will be admitted that the St. Paul & Duluth Company is the successor of the Lake Superior & Mississippi Company and entitled to all the rights as to taxation which the latter company would have. This was decided in *State v. Luther*, 56 Minn. 156.

On July 2, 1864, the Northern Pacific Railroad Company was chartered by act of Congress to build a railroad from Lake Superior to Puget Sound, which would extend through the state of Minnesota. By section 17 of the Congressional Charter the company was authorized to accept "any grant, donation, loan, power, franchise, aid or assistance, which may be granted to or conferred upon said company by the Congress of the United States, or by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power, franchise, aid or assistance to its own use for the purpose aforesaid." By section 18 it

was enacted that the company should obtain the consent of the legislature of any state, through which any portion of its road might pass, previous to commencing construction. The company under its charter had a congressional land grant lying partly within the state of Minnesota, extending across the northern part of the state from east to west. This land was public land of the United States at that time and had not been earned or acquired by the Northern Pacific company when the act of 1870 was passed; and could not be earned except with the consent of the state and subject to such conditions as it might impose.

In this condition of things the legislature of Minnesota passed chapter 65 Special Laws of 1870, which reads as follows:

> Section 1. That the lands, franchises, property, stock and capital of the Northern Pacific Railroad Company shall be liable to assessment and taxation at the same rate and in the same manner, and not otherwise, and shall be exempt from assessment and taxation to the same extent and upon the same terms and conditions as the lands, property and franchises of the Lake Superior and Mississippi Railroad Company, as is provided in and by an act entitled "An act in relation to the taxation of lands granted to the Lake Superior and Mississippi Railroad Company," approved March third, eighteen hundred sixty-five. *Provided, however,* That the gross earnings of said railroad company on which a percentage is to be paid to the state shall include only the earnings of that portion of the Northern Pacific Railroad constructed and operated by said company within the limits of this state.
>
> Sec. 2. That said Northern Pacific Railroad Company shall have the right and author-

ity to acquire and hold lands for right of way, depot grounds, and for all necessary purposes of said company in all respects as provided by the general laws of this state, as set forth in sections numbered consecutively thirteen to twenty-seven, inclusive, of chapter thirty-four, title one, of general statutes now in force. But where said company proceeds to condemn private property in more than one county in the same proceeding, the commissioners to be appointed shall be residents of the county where the property to be taken is situated, or of the county to which such county is attached for judicial purposes. And there is hereby granted to the Northern Pacific Railroad Company, the right of way through and over any lands of this state to the same extent as is granted by act of Congress through and over the public lands to said company.

Sec. 3. That whenever the Northern Pacific Railroad Company shall connect with or cross the route or line of any other railroad within the limits of this state and a portion of the routes or lines of said railroads shall be parallel or coterminous, such portions may by agreement of the companies interested therein, be blended in one track, or a double track and side tracks, and may be owned and used in common for such length of time and upon such terms as may be agreed upon by said companies, and said companies shall thereby be held to have complied with the requirements of their respective charters in that particular, the same as if independent tracks had been built by each.

Sec. 4. This act is hereby declared to be a public act, and shall take effect and be in force from and after its passage. *Provided,* said Northern Pacific Railroad Company shall within ninety days from the approval of the same file with the governor a notice of the acceptance by said company of the terms and conditions of this act.

Approved March 4, 1870.

The Northern Pacific Railroad Company had been authorized to construct its road and exercise its franchises in the state of Minnesota by the act of the Legislature of that state approved March 2, 1865 (Transcript, pp. 19-20). It filed an acceptance of the terms and conditions of the act of March 4, 1870, and thereafter constructed its road through the state of Minnesota in reliance thereon (Transcript, p. 20). The percentage of the gross earnings of said railroad provided to be paid by these laws has been duly paid by the Northern Pacific Company to the treasurer of the state of Minnesota each year (Transcript, p. 20). The bill of exceptions settled on the trial shows that the parties admitted these facts in the record (See Transcript, pp. 54-55).

The answer alleges that a certain parcel of land involved in this proceeding was a part of the said congressional land grant of the Northern Pacific Railroad Company, and certain other parcels were a part of the said Lake Superior & Mississippi grants, and that the said acts of the state of Minnesota approved March 3, 1865, and March 4, 1870, and the acceptances of the same filed as aforesaid constitute contracts between the railroad companies and the state, and asserts that the attempted repeal by the legislative act of 1895 without the consent of the companies violates the obligation of said contracts contrary to the provisions of the constitution of the United States.

The repealing act Ch. 168, Laws of 1895 reads as under.

An act relating to the taxation of certain lands owned by railroad companies in this state, and repealing laws and parts of laws relating to the taxation of the same, and to provide for the submission of this act to the people of this state for their approval or rejection.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. All lands in this state heretofore or hereafter granted by the state of Minnesota or the United States, or the territory of Minnesota to any railroad company shall be assessed and taxed as other lands are taxed in this state, except such parts of said lands as are held, used or occupied for right of way, gravel pits, side-tracks, depots and all buildings and structures which are necessarily used in the actual management and operation of the railroads of said companies. *Provided,* that said railroad companies shall continue to pay taxes into the state treasury upon their gross earnings in the same manner and in the same amount as now provided by law. And that nothing in this act contained shall be construed to repeal said laws except in so far as the same relate to the tax upon said lands.

Sec. 2. Such portion or portions of any act or acts, general or special, of the state or territory of Minnesota heretofore enacted, which provides, or attempts to provide, for any exemption of lands hereby declared taxable, from taxation, or for any other method of taxing said last mentioned lands different from the method of taxing other lands in this state, or which are in any manner inconsistent with the provisions of this act, are hereby repealed.

Sec. 3. If this act shall be held to be void so far as it applies to the lands of any particular railroad company in this state, it shall not be ground for declaring it void or inapplicable to any other company not similarly situated.

Sec. 4. This act shall be submitted to the people of this state for their approval or rejection at the next general election for the year eighteen hundred and ninety-six (1896).

The Secretary of State shall cause to be printed upon the form of ballots used in voting for state officers at the next general election, in manner conformable with the requirements of the general election law the words:

For taxation of railroad lands.....	Yes.	—
	No.	

and each electing voter at such election shall designate his vote by a cross mark made opposite one or the other of the said words "Yes" and "No," and the said election shall in all respects conform, so far as may be, to the requirements of the general election law, and the returns of said election shall be made, canvassed and certified, and the result thereof declared in the manner provided by law for returning, certifying and canvassing votes cast for state officers.

Sec. 5. This act shall take effect and be in force from and after its passage.

Approved March 19, 1895.

The controversy here before the court arose in this way: James N. Marr, a tax-payer of Aitkin County, Minnesota, represented by the Attorney General of the state, filed a petition in the name of the state for a writ of mandamus against Fred Stearns as County Auditor of Aitkin County, Minnesota, praying for a writ commanding Stearns as County Auditor to place on the tax list of Aitkin County certain parcels of land (Transcript, pp. 4-6); the writ being issued, Fred Stearns as County Auditor answered, setting up that certain

of the lands described in the petition were lands of the St.Paul & Duluth Railroad Company, certain of them lands of the Northern Pacific Railroad Company, and certain of them lands of the Great Northern Railway Company; the answer also pleaded the facts in each case upon which these lands were claimed not to be subject to the taxation attempted to be imposed; the answer is in the Transcript, pp. 10-24; the case was tried before the court, findings made and a bill of exceptions settled; the findings are Transcript, pp. 28-38, the bill of exceptions Transcript, pp. 39-56; a final judgment was awarded in the trial court granting a peremptory writ of mandamus as prayed (Transcript, pp. 38-39); appeal was taken to the supreme court of Minnesota, where the judgment of the trial court was affirmed (Transcript, p. 70); this writ of error brings up the final judgment of the supreme court of Minnesota.

ASSIGNMENTS OF ERROR.

1. The court below erred in holding and ruling that the law of March 3, 1865, did not constitute a contract between the state of Minnesota and the Lake Superior & Mississippi Railroad Company, not subject to repeal or modification without the consent of the company.

2. The court below erred in holding and ruling that the laws of March 3, 1865, and March 4, 1870, did not constitute a contract between the

state of Minnesota and the Northern Pacific Railroad Company, not subject to repeal or modification without the consent of the company.

3. The court below erred in holding and ruling that Chapter 168, Laws of 1895, is not a law violating the obligation of the said contracts and in violation consequently of the Constitution of the United States.

ARGUMENT.

I.

Whether the laws of 1865 and 1870 were valid laws and constitute a contract is a question for this court and the decision of the state court is not binding here.

At first sight it might be thought that the construction placed by the supreme court of a state on the constitution of the state, being ordinarily binding on this court, and the laws of 1865 and 1870 in question having been held by the state court not to make a contract, because they were in violation of the state constitution, that that conclusion is also binding on this court. But while under ordinary circumstances this court will follow the decisions of the state court as to the construction of the laws and constitution of the state, that rule does not apply to a case where the very point in controversy is, that those laws constitute a

contract violated by some subsequent state statute. In such a case this court must either abdicate its jurisdiction or must decide for itself whether there is in the first instance a contract. Whether the obligation of a contract has been violated is a question arising under the constitution of the United States and within the jurisdiction granted to this court by the constitution and acts of Congress. In order to determine whether the obligation of a contract has been violated it is essential first to determine whether there was a contract. The one question necessarily includes the other. And when this court inquires whether a contract has been violated it must first determine for itself whether there was a contract. If, in order to decide whether there was a contract, the court must construe the constitution or laws of a state, the validity, scope and effect of those laws becomes a necessary part of the question to be decided by this court. *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S. 486, 492 and cases cited: *Jefferson Branch Bank v. Skelly,* 1 Black 436, 443.

II.

It has been held in this court from the beginning that a state may by contract, based upon a valuable consideration, make a binding contract with an individual or corporation on the subject of taxation. *State of New Jersey v. Wilson,* 7 Cranch., 164; *Gordon v. Appeal Tax Court,* 3 How., 133; *State Bank of Ohio v.*

Knoop, 16 How., 369; *The Jefferson Branch Bank v. Skelly,* 1 Black., 436; *University v. People,* 99 U. S., 309; *Asylum v. New Orleans,* 105 U. S., 362; *Pearsall v. Great Northern Ry. Co.,* 161 U. S., 662; *Mobile & Ohio Railroad Co. v. Tennessee,* 153 U. S., 486.

III.

The acts constitute contracts in form.

That the said acts of 1865 and 1870 constitute contracts *in form* is plain. The act of 1865 was passed before the construction of the Lake Superior and Mississippi railroad had commenced, before an acre of its land grant had been accepted or earned. It was part of the terms on which the company agreed to take the grant and to undertake the construction of the railroad. It provides in section 2 that, upon filing by the company in the office of the secretary of state of an acceptance of the act, the same shall be *obligatory upon the state and upon said company.*

The act of 1870, which applies the last named law to the Northern Pacific Railroad Company and its land grant, is equally clear. It was passed before the Northern Pacific road had been commenced; before an acre of the land grant had been earned. It was passed to induce the construction of the road. In the record it is agreed that the road was constructed in reliance upon it. The

act applies to the Northern Pacific Company and its grant all the provisions of the act of 1865 in favor of the Lake Superior and Mississippi Railroad Company. Section 4 requires that the Northern Pacific Railroad Company shall within ninety days file with the governor "a notice of the acceptance by said company of the terms and conditions of this act." The acceptance was filed.

These acts constitute contracts in form and were intended as contracts by the Legislature and by the company.

In the case of *State on Relation of Marr v. Luther,* 56 Minn. 156, the act of 1865 was considered and it was held to apply until the lands were sold, contracted to be sold, or leased by the Railroad Company, the supreme Court saying (p. 159): "The effect of this by necessary implication was that until sold, contracted to be sold, or leased, the lands were to be entirely exempt from taxation in the ordinary way."

The case now here is readily distinguishable from that line of authorities which holds that a mere gratuitous exemption by general law or special law,not based upon consideration and not amounting to a contract, is subject to repeal by subsequent legislation. Here the consideration of the law was the construction of the road, the acceptance of the grant and the agreement to pay the gross earnings tax, all of which were undertaken by the railroad in reliance upon the law. Many millions of dollars have been expended by the Northern Pacific Railroad Company and by the St. Paul & Duluth

Company, perhaps without any income or return, in reliance upon the proposition of the State that the lands should not be taxed except through a payment of three per centum of the earnings of the roads.

That the acts were intended as and understood to be contracts, both by the Legislature and the companies; that they were based on a full valuable consideration now executed; and that they ought in equity and justice to be sustained (unless there is some insuperable legal objection), is settled by a long line of decisions of the supreme court of Minnesota.

In the case of *First Division St. Paul and Pacific Company v. Parcher,* 14 Minn. (Gil. ed.) p. 224, the question was considered of similar acts passed in territorial times and the court said, on page 249:

> "In support of this ground of demurrer the defendants argue—*First,* that the taxing power is a sovereign power, and hence that it is not competent for a legislature to alienate or abridge it unless authorized so to do by the people. The charter granted in May, 1857, constituted a contract between the territory and the Minnesota & Pacific Railroad Company, one of the terms of which was that the lands granted in aid of the road should be exempt from taxation till sold and conveyed by the company. That the exemption thus conferred is a contract right—a right which a legislature, in the absence of constitutional inhibition, is competent to grant, and inviolable—has been settled in a series of decisions by the

Supreme Court of the United States, so that the matter is not open to discussion. *State of New Jersey v. Wilson*, 7 Cranch. 164; *Gordon v. Appeal Tax Court*, 3 How. 133.

Again the court said, on page 251:

"It is also urged by the defendants that the exemption from taxation was granted to the Minnesota & Pacific Railroad Company without consideration, and that, therefore, it does not come within the principle of the decisions of the federal supreme court before cited, but it is rather to be classed among the *privilegia favorabilia* spoken of in *Rector, etc., of Christ Church v. County of Philadelphia*, 24 How. 300, and may, therefore, be revoked at the pleasure of the sovereign. We are of the opinion that a sufficient consideration is to be found in the agreement of the company to construct the road, and to fulfill the other duties imposed by the charter, and among them to pay 3 per centum of the gross earnings of the road into the treasury of the territory or future state."

In *State v. Winona & St. Peter R. R. Co.*, 21 Minn. 472, 477, the court by Chief Justice Gilfillan, in considering the act of 1857 providing for payment of a gross earnings tax and exemption from other taxes of the lands until sold, said:

"This is a contract between the state and the company and whether it is provident or improvident each must abide by it according to its true intent."

In *City of St. Paul v. St. Paul and Sioux City Railroad Co.*, 23 Minn. 469, 475, referring to the act of 1857, granting lands to the Root River Valley & Southern Minnesota R. R. Co., as amended by the act of 1864, the court says:

"This modification of the original contract

> was prohibited by no provision of the constitution; and the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since, as valid, by both the executive and legislative departments of the state government, but, by an express constitutional amendment adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by a vote of the electors of the state."

In *St. Paul and Chicago Ry. Co. v. McDonald*, 34 Minn. 195, 209, the court, by Justice Mitchell, in regard to a similar contract says:

> "The state should and must in letter and spirit, religiously keep its contract obligations; but the law will not tolerate the use of mere forms to evade its spirit."

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 467, the court said:

> "For the prior enactment embodied the elements of a contract between the state and the corporation which had been in force and acted upon both by the state and by the company for many years, and its annulment by the act of the state alone was impossible under the federal constitution."

It is not out of place further to call the attention of this court to the history of the taxation of land grants in Minnesota and the consideration for these contracts as explained by the highest court of the state. In the Parcher case on page 253 the court said:

> "In addition to what was there said, it is entirely proper for us to refer to the state of things existing when the policy to be adopted was under consideration by the legislature.

> The state was then almost a wilderness. Its population was small and sparse, its capital limited, its business depressed, its resources undeveloped. There was not a mile of railroad within its borders. An outlet by rail for the products of the state was a matter of prime and pressing necessity. The inducements which we were able to hold out to secure this outlet and the construction of needed lines of railway consisted rather in what the state was to be than in what it was. The country at large had hardly recovered from the financial revulsion of 1856-7. How soon the railroads in this state would prove remunerative to their owners, as well as how soon the lands would sell, were matters of conjecture and experiment. And notwithstanding repeated and continued tenders of all the roads, lands and franchises, together with the privileges and exemptions in regard to taxation, it was not until the summer of 1862 that the first ten miles of railway were put in operation in this state. These facts are not without weight in considering whether the grants of lands, without the exemption from taxation, would probably have induced capital to undertake the construction of the roads, especially when we take into account the proverbially high rates of taxation in newly-settled communities."

Again, in the case of *City of St. Paul v. St. Paul and Sioux City Railway Company*, 23 Minn. 471, the same court said:

> "It is a part of the legislative history of the state that its policy in regard to the taxation of this and the other land-grant railroads, so-called, was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state and every portion thereof so far as possible an ultimate and adequate return for the value of the franchises conferred, including this immunity from taxation. It is also a part of this well-known

history that in entering upon the execution of the trust created by the first congressional land-grant act, and in the disposition of the lands granted by that act among the four original land-grant companies in 1857, the then territory (now state) adopted a distinct and special policy of taxation in reference to those companies and the lines of road which they were authorized to build, looking to the early completion of these lines, and the just rights and interests alike of the companies, the state at large, and all localities therein. This policy contemplated as a basis of taxation the annual gross income or earnings of the companies, instead of an *ad valorem* assessment or valuation of their franchises and property; and, instead of a general and local system of taxation, the payment of a fixed per centum of their annual earnings into the state treasury for the benefit of the whole state was provided for in lieu of all taxes whatsoever. This, it was supposed, would prove less vexatious and burdensome to the companies, especially in the infancy of their existence; ultimately more advantageous and productive to the revenues of the state, and clearly more just and equal to all localities therein, as all would share equally in the benefit to accrue from taxes raised and contributed on account of property held under franchises derived from the whole people. Experience is fast demonstrating the wisdom of this policy and realizing the expectations of its founders."

That these acts constitute a contract (provided the acts were valid laws) is not doubtful under the decisions of this court. *Pacific Railroad Co. v. Maguire,* 20 Wall. 36; *Farrington v. Tennessee,* 95 U. S. 679.

Not only did the state secure by these contracts the unmeasurable benefit and advantage of construction of the railroads some years in advance

of the time when under different circumstances they would have been constructed; not only did the state secure accelerated settlement and development of its territory; but it secured a perpetual obligation on the part of the companies to pay annually to the state 3 per cent on their gross earnings. By universal practice and by 40 years of practical construction in Minnesota this is now settled to include 3 per cent on the proportion earned in the state upon interstate commerce. When these laws were passed it was more than doubtful if such an assessment on interstate earnings could be legally levied as a tax. Indeed it is still doubtful. See what this court said in *McHenry v. Alford,* 168 U. S. 651, 670. Railroad companies in Minnesota are bound by these covenants to pay this percentage whether valid as a tax or not; and while the lands are being rapidly sold and in a few years will be completely disposed of to settlers, the 3 per cent gross earnings assessment will continue forever. It may well be that this will prove in the end to be a serious burden to the railway companies and largely exceed what ordinary taxation would amount to.

We can affirm without the possibility of successful contradiction that the repealing act of 1895 is *on its face* an act confiscating property and violating the obligation of a contract; for section 1 provides that *all lands* in this state, heretofore or hereafter granted by the state, or United States, *or the territory* to any railroad company shall be assessed and taxed as other lands are taxed; and that the

companies shall notwithstanding still continue to pay 3 per cent on their gross earnings as at present. It has been thoroughly settled by the supreme court of Minnesota, as we shall hereafter show, that the *territory* of Minnesota had power to make such contracts as are here in question and that they bound the future state; also that the state could *regrant* on the same terms, after forfeiture of a territorial grant; so that *at least* all territorial railroad grants and all state regrants are protected by the federal constitution from the operation of this confiscatory law. The result will be, if the validity of this law is sustained as to grants made originally by the state, to cast a heavy burden on companies holding such grants, like the Northern Pacific and St. Paul and Duluth, and exempt from such added burden all the companies holding territorial grants or state regrants. It is matter of public knowledge and will not be questioned that the large majority of railroad grants in Minnesota are territorial grants, or state regrants.

Section 2 of the law in question expressly attempts to repeal the acts of the *territory* of Minnesota, which attempt to exempt land grants, or provide for their taxation in any other method than that fixed in the act. And section 3 provides that the law shall still operate notwithstanding it may be held void as applied to any particular grant. This section evidences the understanding and intention of the legislature (1) to repeal if it could all the contracts of the state or territory (2) to repeal at least the contracts of the state if the courts

should hold that the territorial contracts were inviolable and so make the railroad tax laws discriminating and unequal; to destroy in short all uniformity.

The court will also learn, by reading the record and opinion in the supreme court of Minnesota in this case, that the act of 1895 was only passed by the vote of the lieutenant governor, an ex-senator who had no right to vote (according to the subsequent decision of the senate) but who was given a right to vote by the decision of the supreme court in this case, overruling the senate.

The court will also note that the passage of the law by the people was obtained by a cunning device. Section 4 of the act provides for its submission to the people (as was necessary under the constitutional amendment of 1871) and fixed the form of ballot, which was to be:

For taxation of railroad lands...	Yes	
	No	

This section proceeds on the theory that railroad lands were not then taxed, which was contrary to the fact and to uniform decisions of the supreme court of Minnesota to the effect that they were taxed. Those who drafted this act well knew that the voters of the state would never vote *against* the taxation of railroad lands, as the ballot on the face of it required them to do if they opposed the passage of the law. The act was therefore not *fairly* passed.

IV.

The constitution of Minnesota, adopted in 1858, sections 1 and 3 of Article IX, have no application to the property in question.

The supreme court of Minnesota does not question that the acts constitute contracts in form and intent, or that the contracts are fair and ought equitably and justly to be performed. What that court holds is, that the acts were beyond the power of the legislature, because of the constitutional requirement of *uniformity* in taxation, and therefore void in law.

Passing for the present any consideration of the proper construction of these constitutional provisions, the fact must be admitted that they have no application to property conveyed by the United States to the state in trust to aid works of internal improvement, nor to lands of the United States. Such property could not be taxed by the state in any event. The state cannot tax the lands of the United States. The constitutional provisions relate to *private* property only and must be read as if this qualification were written in them.

When the laws of 1865 and 1870 in question were passed the lands involved in this suit now belonging to the Northern Pacific Railroad Company were property of the United States, and the lands belonging to the St. Paul and Duluth Railroad Company were,either state swamp

lands, or lands conveyed by the United States in trust to the state of Minnesota to aid the construction of a railroad from the Mississippi river to Lake Superior. At that time the constitutional limitations on legislative power of Article IX had no application to either class of lands. Such lands were set aside for a public use with the privilege of commuted taxation created with respect to them and impressed upon them while they were yet public lands. The history of the transaction as shown in the quotations before made from the opinions of the supreme court of Minnesota is, that when these laws were passed the state was almost a wilderness, its population small and sparse, its capital limited, its business depressed, its resources undeveloped. In 1865 there were very few miles of railroad within its borders. An outlet for the products of the state was a matter of prime and pressing necessity. The state had not succeeded in spite of repeated and continued offers in securing the construction of railroads. It was not until 1862 that the first 10 miles of railway were built in the state. We are authorized to infer, as the supreme court of Minnesota has said, that without the offer of the contract in question capital could not have been induced to undertake the construction of the roads, at least for years to come, and that the state received in the contract a fair and full equivalent for future taxes.

These lands were not subject to taxation so long as they remained public lands. They *could* not be taxed until after they passed out of public owner-

ship. So long as they remained public lands they were not subject to the taxing power of the state nor to the limitations on that power expressed in Article IX of the constitution. These limitations are not more extensive than the taxing power itself which they limit. That power and the limitations apply to private property only. Now, in order to get a private corporation to build a railroad the state found it necessary to make a certain contract; it accepted the construction of the road and perpetual payment of three per cent. of its gross earnings to the state and granted in consideration thereof freedom from any other form of taxation until the lands were sold. Thereby the right, immunity, or privilege to pay taxes by a percentage of railroad earnings was impressed upon the land while it was yet public property; and the private interest only attached subsequent and subject to the commutation contract. The immunity attached to the title before the company accepted or earned the lands. The constitution of the state cannot be held to have intended to prevent the state from making such bargains as to its own public domain, or as to government land within its borders, if it found such contracts reasonable and necessary to secure works of internal improvement. And whether such contracts were reasonable or necessary is a question which was settled by the legislature.

(a) *Our contention is we think sustained by the decisions of the supreme court of Minnesota.*

In the case of *First Division of St. Paul and*

Pacific Railroad v. Parcher, 14 Minn. (Gil. ed.) 224, the facts were these; an act of the territorial legislature organized the Minnesota and Pacific Railroad Company and conferred on that company a land grant with provisions as to taxation similar to those here involved; the state having furnished certain state railroad bonds in aid of the company took a mortgage upon the company's property and franchises to secure it; this mortgage the state foreclosed, and on June 23, 1860, bought in the mortgaged property and franchises; this estate and the franchises, including the franchise as to commuted taxes, the state legislature re-granted to the St. Paul and Pacific Railroad Company in March, 1862 (14 Minn. pp. 233-4). The case directly involved the taxes of 1867 in Wright County. Before this, Congress had, by act of March 3, 1865, (13 Stats. at Large, p. 526), *increased* the grant to the state of Minnesota to aid the construction of the St. Paul and Pacific railroad. This additional grant had been conferred on the St. Paul and Pacific company by section 2, chapter 6, special laws of Minnesota 1865. The suit was brought by the company to restrain the assessment of taxes upon lands, as the opinion says, of which it had become the owner under the act of 1857 before referred to *and under subsequent legislation* (meaning, we think, by the italicised clause the said legislation conferring an additional grant), 14 Minn. 249. The constitutionality of the commutation or exemption claimed was challenged in the Parcher case on the following grounds:

(a) that it formed a corporation by special act in violation of section 2, Article X of the state constitution of 1858 (b) that the taxing power is a sovereign power and it was not competent for a legislature to alienate or abridge it unless authorized to do so by the people (c) it was further contended, that even if the state legislature could grant a privilege of this nature as to taxation, a territorial government, which was a mere creature of congress created for temporary purposes only, had no power of the kind (p. 245-250); (d) other grounds of objection were urged not necessary to state. The court said, p. 250:

> "The power thus conferred (i. e., by the act of congress creating the territory) would appear to be ample to sustain the grant of exemption from taxation in this case, and we can perceive no reason why such grant may not be a subject of legislation *as rightful under a territorial as under a state government.*"

In this case we find eminent counsel making all the points which occurred to them against the validity both of the original grant by the territory and the re-grant in 1862 by the state *and the additional grant by the state in the act of* 1865. The state having acquired the territorial grant by foreclosure, the re-grant would certainly seem to have been subject to the provisions of the constitution, if the 1865 and 1870 grants here in question were. But counsel did not suggest to the court, that those provisions of the state constitution respecting uniformity of taxation were any objection to the power of the state to make the con-

tract. The validity of the commutation as to the additional congressional grant of 1865 seems to have been distinctly involved in the Parcher case and was certainly as obnoxious to those provisions of the constitution requiring uniformity of taxation, as the state grants we are now considering. The court sustained the validity of the legislation and must be regarded as having necessarily decided that the re-grant by the state legislature of the commutation tax privilege, together with the land which then belonged to the state, was not obnoxious to these sections of the constitution; and also the court must have decided that the additional state grant of 1865 with commuted taxation attached was not obnoxious to the constitution.

That this is the true construction of the decision in the Parcher case is shown by subsequent decisions of the supreme court of Minnesota. In *State v. Winona & St. Peter Railroad Company,* 21 Minn. 315, a case decided in 1875 involving taxes of 1873, land had been granted to the Transit Railroad Company by acts of the territorial legislature. These grants were on terms as to taxation similar to those here involved. On March 10, 1862, by chapter 19, special laws of Minnesota for that year, these grants and all the rights, benefits, privileges and franchises of the Transit company, having become forfeited to the state, were regranted by the state legislature to individuals, who became the Winona & St. Peter Railroad Company. There was also involved in this case an additional congressional grant made March 3, 1865, 13 Statutes

at Large, 526, granted by the state March 5, 1865; See opinion of court 21 Minn. 315. In the case cited the validity of this legislation was expressly challenged, as being unconstitutional by reason of the constitutional requirement that "Laws shall be passed taxing * * * all real and personal property at its true value in money," and it was said that this constitutional provision prohibited and rendered void any law passed after the adoption of the constitution creating an immunity or privilege with respect to taxation. The court said this constitutional provision did not appear to have been considered in the Parcher case, but distinctly sustained, as against this constitutional requirement, not only the validity of a re-grant by the state legislature of a territorial immunity or privilege, which had been forfeited to and acquired by the state, and at the time of the re-grant held by the state as its property, but also sustained the validity of the additional congressional and state grant, holding both questions to have been settled by the Parcher case. This the court decided without reference to the constitutional amendment of 1871, which is not mentioned in the case.

In *State v. Trustees of Southern Minnesota Railroad Company,* 21 Minn. 344, a forfeited territorial grant was re-granted by the state, chapter 1, special laws of 1864, to the Southern Minnesota Railroad Company. And by section 5 of this act it was enacted that the lands "shall be and are hereby exempted from all assessments and from all

taxation whatsoever, until the same shall have been sold and conveyed by the said company." This was on consideration of a payment into the state treasury of a percentage of gross earnings annually. The opinion of the court does not rest the case on the validity, or invalidity, of the territorial grant, but refers *only* to the said act of the state legislature. The court decides in favor of the immunity from taxation, following the Parcher case. This case also involved the validity of an additional congressional and state grant with the same privilege of commuted taxation, viz: the congressional grant provided in the first clause of the act of July 4, 1866 (14 U. S. Stats. at Large, p. 87).

See also *Minnesota Central Railway Company v. Melvin,* 21 Minn. 339.

It will be noted that the Parcher case was decided and the taxes involved therein were levied before the passage of the constitutional amendment of 1871, and neither that case nor the cases thus far cited refer to that amendment as validating the legislation, but distinctly hold that the legislation was valid independent of the amendment. It will thus be seen that the supreme court of Minnesota, in passing upon *state grants* similar to those here involved, without referring to the constitutional amendment of 1871, has distinctly and several times said that the validity of this legislation was *settled by the Parcher case.*

In *County of Stevens v. St. Paul, Minneapolis & Manitoba Ry. Co.,* 36 Minn. 467, 472, the court considered an additional congressional grant made

March 3, 1865, to aid in the construction of the St. Paul & Pacific Company's lines and the state grant of the same by act March 2, 1865, also the act of March 4, 1865, relating to taxation of these lands. The case involved therefore the questions decided in the Parcher case and in *State v. Winona & St. Peter Company,* of the right of the state legislature to alter and amend a territorial exemption, and involved more prominently perhaps than any previous case the right of the *state* legislature to create an exemption as to lands granted by it. The opinion says (p. 472):

> *"The point that sections* 1 *and* 3 *of article IX of the constitution forbid this legislation was long ago settled in the Parcher case, above cited, and in the cases of State v. Winona & St. Peter R. Co., supra, and City of St. Paul v. St. Paul & Sioux City R. Co., supra*; it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of a percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed."

In *Chicago, Milwaukee & St. Paul Ry. Co. v. Pfaender,* 23 Minn. 217, it appeared that by special laws of 1865, chapter 6, section 18 (passed by the state legislature), the terms of the territorial contract involved in the Parcher case were modified, so that 1 per cent on gross earnings was to be paid for a term of years, 2 per cent for certain succeeding years, and 3 per cent thereafter. The

court without hesitation sustained the validity of this amendment. If the state legislature could amend (with the consent of the company) the terms of an exemption or commutation granted by the territorial legislature, this involved necessarily the power of the state legislature to create a similar commutation or privilege.

In *City of St. Paul v. St. Paul & Sioux City Railroad Co.*, 23 Minn. 469, 475, the court distinctly sustains, as against the sections of the constitution now under consideration, the validity of a legislative alteration in 1864 of a commutation privilege with respect to taxes granted by the territorial legislature, saying:

> "And the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments of the state government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by the vote of the electors of the state."

In *County of Nobles v. Sioux City & St. Paul Railroad*, 26 Minn. 294, the validity of an act of 1869, chapter 50, was sustained, which authorized a transfer from one corporation to another of a tax commutation right created by the territorial legislature. It is difficult to see how, if the state legislature could authorize a transfer and assignment of such a right to a new corporation, it could be held at the same time to have no power to *create* such right.

In *State v. Northern Pacific Railroad Co.*, 32 Minn. 294, the court interprets and construes chapter 65, special laws of 1870, and the Lake Superior and Mississippi act of March 3, 1865 (being the laws here relied upon). The court discusses the force and effect of these laws at considerable length, without a suggestion that there is, or ever was, any question about their validity.

In *St. Paul & Chicago Railway Co. v. McDonald*, 34 Minn. 195, the court considered a grant of swamp lands made by the state legislature, special laws 1865, chapter 9, which law provided for a commuted scheme of taxation similar to that here under consideration. The court did not suggest that this act was invalid, but held that the lands were not subject to it because they had been *sold by the company.*

These decisions of the supreme court of Minnesota therefore establish the following propositions: (a) that the state could validly re-grant lands, subject to commuted taxation, which had been originally granted by the territory and forfeited to, or acquired under foreclosure by, the state (b) that the state legislature could amend and alter the time and conditions of such a previous territorial grant with the consent of the grantee (c) that the state legislature could authorize the transfer thereof from one grantee to another (d) that there was nothing in the state constitution, which prohibited the state legislature from making new and additional grants on similar terms and conditions.

As before stated, the Parcher case was decided in 1869 and the act in question applicable to the Northern Pacific was passed in 1870. The St. Paul and Duluth railroad was completed about this time. The Northern Pacific railroad was commenced and completed through the state of Minnesota shortly after. It is perfectly safe for us to assert, that for over 20 years thereafter the Parcher case and the decisions following it were regarded by the bench and bar of Minnesota, as having settled the validity of this class of legislation, whether passed by the territorial legislature or the state legislature. Indeed most of the doubts suggested were with respect to the territorial grants.

It is a rule well founded in justice and authority, that the law as settled when a contract is made must control as to the validity and effect of the contract and that this court will apply that law, ignoring a later decision of the state court which would have the effect to violate the contract. *Havemeyer v. Iowa County,* 3 Wall. 294; *Gelpcke v. City of Dubuque,* 1 Wall. 175; *Chicago v. Sheldon,* 9 Wall. 50; *Olcott v. Supervisors,* 16 Wall. 678; *Louisiana v. Pillsbury,* 105 U. S. 278, 294. It will be noted that in the case at bar the state court gave effect to a subsequent *statute* of the state repealing the law constituting the alleged contract and the case is not therefore controlled by *Bacon v. Texas,* 163 U. S. 207, and decisions there cited.

(b) *Our contention is sustained by the decisions of other courts.* In *Illinois Central Railroad Co. v. The County of McLean,* 17 Ill. 291, public

lands had been granted to the Illinois Central Railroad Company under a contract that they should be taxed by the railroad company paying a percentage of its gross earnings into the state treasury, and taxed in no other way. The validity of this contract was challenged upon provisions of the Illinois constitution similar to those in question contained in the Minnesota constitution. But the court said (p. 296):

> "The case before us is not an exemption or immunity from the payment of taxes. Nor do I hold to a power to discriminate and exempt the owners of the same kinds of property provided to be taxed, or a change of the rule of valuation and assessment. But the exemption of the donated lands may be regarded as an exemption of the *public property until its sale, or the performance of the conditions which will release the lien of the state.*"

In the act of 1865 in question is contained a provision that the state shall have a lien upon the railroad and all the property of the company to secure to the state the payment of three per cent. annually upon gross earnings, and that such lien shall take precedence of all demands, decrees and judgments against the company. A similar provision was in the grant to the Illinois Central Railroad Company considered in the County of McLean case. In a separate opinion in that case by Skinner, Judge, p. 298, that Judge concurred in the majority opinion on the ground that the land was public property not subject to taxation; and the retention of a lien on it by the state removed it entirely

from the provisions of the constitution providing for uniformity of taxation.

In the case of *People v. Auditor General,* 7 Mich. 84, the court considered a case where land had been granted to the state by the national government for the construction of a canal. The grant was accepted by the state and a contract was entered into with the canal company stipulating for the remission of taxes on the granted lands for the period of five years. This was challenged as being contrary to the rule of uniformity of taxation provided in the constitution of Michigan. But the court said (pp. 89-90):

> "It is evident from a consideration of these acts that the land was never a part of the public domain of Michigan, either by grant from Congress, or by sale to a purchaser, before the passage of the act in question, so that the right of taxation had accrued to the state. It was granted to the state for the specific purpose of being applied, either by sale or appropriation, to the purposes of the construction of the canal. As such, it assumed the character of a fund, to be expended under the direction of the state; and so the legislature evidently regarded it, and that the state held such land only as trustee for the accomplishment of that purpose."
>
> "Instead of selling the lands, and appropriating the avails towards the construction of the canal, the legislature found it desirable, if not necessary, to appropriate the lands themselves. From the course of legislation we may presume that this appropriation of the lands, was found to be insufficient of itself to induce any one to undertake the work, and that in order to render it sufficient, the state authorized the contract for the remission of the taxes

thereon. This authority was given, and the contract executed, while the lands were in a condition in which they could not be taxed, and until such right of taxation had accrued to the state, it was not within the scope of either its constitutional or legislative provisions. The state had power to contract with the company to convey the lands after five years, and thus relieve them during that period from taxes, and if it might do this, it is difficult to find a reason why it might not so convey them as to secure the same exemption from taxation. In making this contract the state acted as the trustee of the general government; in the law authorizing the contract, it was dealing with the subject of the trust, over which no right of taxation then existed."

In *Portland v. Water Co.*, 67 Maine, 135, it was held within the constitutional authority of the legislature, to empower the city council of Portland to exempt from taxation for a term of years property of the Portland Water Company, in consideration of an undertaking and agreement by the company to furnish, free of cost to the city, a supply of water for its public and municipal purposes.

The constitution provided

> "All taxes upon real estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof."

The court say (at p. 137):

> "We are not satisfied that the legislature cannot, by charter or contract, in any case and under any circumstances, release one corporation from taxation, merely because it does not include in its exclusion from taxation all similar corporations in the state.

> "The property of the defendants has been appropriated and devoted to a public use and may be exempted from taxation for the same reason that town houses and school houses and railroad tracks are exempted. It was only because their works were public works that they would be permitted to take land for their purposes under the exercise of the right of eminent domain. True, the title of the property is vested in the corporation. But the corporation holds it, to some extent, as a trustee for the public. It must be used for the public, and in a great measure its use may be controlled by the public."

In *State of Arkansas v. County Court of Crittenden County*, 19 Ark. 360, it was held that lands, granted by congress to the state for the purpose of enabling the state to construct levees and drains to reclaim swamp and overflowed lands and sold by the state with an exemption from taxation for ten years, or until said lands are reclaimed, were protected by the contract of the state from taxation during the period named, and an act of the state legislature taxing them was repugnant to the United States constitution and void.

It was further held that the exemption was not repugnant to the constitution of the state, to the effect that "all property subject to taxation shall be taxed according to its value," and that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value."

The character of these lands and how they differ from ordinary private property was well ex-

plained in the opinion of Mr. Justice Peckham, in *McHenry v. Alford*, 168 U. S. 651, 665-668.

This question may be illustrated by reference to two classes of lands; (a) lands like those of the St. Paul and Duluth, granted by congress to the state in trust, (b) lands of the United States like those granted to the Northern Pacific.

First, as to lands granted by congress to the state in trust. Such lands need not have been conveyed to a railway company at all. The trust defined in the act of congress was "to aid the construction" of a certain railway. The state was left to pass such law, as might be found advisable, fixing the manner of the execution of the trust. As said by the supreme court of Michigan in the case above cited, the state might have contracted to convey the lands to the company after the expiration of a term of years, during which term they would not have been taxable; and indeed the state might have enacted that it would retain itself the title to the lands and sell them, turning over the proceeds to the railway company. Under any such condition the lands would have remained untaxable. But the state saw fit, on considerations of convenience and general benefit, to convey the lands immediately to the railway company and allow it to dispose of them. No good reason, we think, can be advanced why, if the lands could have been held by the state untaxable, the trust title cannot be vested in the company by contract, with the provision that they

shall be in that condition untaxable, or taxable only in a certain manner.

Second, as to lands of the United States, like those of the Northern Pacific here in question. The state had, under the charter of the Northern Pacific Railroad, absolute veto power on the construction of the road through Minnesota and on the acquisition of these lands by the company. This absolute power included the right of the state to have given a conditional consent and to have said to the company, that it might construct its road through Minnesota in consideration of releasing or conveying to the state its land grant within the state, on terms that the proceeds of such land should be turned over to the company as the lands were sold. To have imposed such condition was perfectly within the power of the state. Now, instead of saying this, the state said to the company, you may build your road and take the title to these lands from congress in consideration of your paying to the state three per cent. of gross earnings, the lands to be taxable in no other manner.

In either of these cases it is taking an extremely narrow view to say that the state has no right to make a *bona fide* contract, under which it gets the full benefit of taxation, under which it receives a full *quid pro quo;* and this case must be considered as if the state did receive a full *quid pro quo,* because we are discussing the *power* of the legislature, not the wisdom of its contract. In either of the cases supposed the state is not bargaining away any present right which it has to

tax the lands. It is parting with nothing. It is bargaining to set aside for a public use its own property, or property held upon a public trust, which it cannot tax so long as so held, and fixes the taxation as part of the contract of grant. The case we submit is widely different from that put by one of your honors on the former argument, of a state bargaining with a private individual for exemption of his private property, in consideration of his bringing it into the state. The constitution was intended to prohibit all bargains of that sort as to private property. It provides that such property shall be taxed.

It must not be forgotten that the state is a sovereign. It has power to grant charters and franchises, and to make contracts. No provision of the constitution restricts in terms its power to *contract*. It is not reasonable to infer a restriction of that power from a constitutional provision, that taxes shall be levied uniformly on all property at its true value. Can such a provision be held to forbid a contract by which the legislature secures a full equivalent for taxes? How is the case distinguishable from those which have been frequently passed on by this court, with respect to which the court said in *Jefferson Bank v. Skelly*, 1 Black, 436, 446:

> "This court has also decided that the charter of a bank is a franchise which is not taxable as such, if a price has been paid for it which the legislature has accepted with a declaration that it shall be in lieu of all other taxation."

It seems to us that the argument, which underlies the opinion of the supreme court of Minnesota, is distinctly contrary to those decisions of this court, which have held that the state has power to contract with respect to taxation. It is doubtful if there is any state constitution, which does not contain provisions either express or implied, requiring uniformity of taxation and forbidding discrimination. It has been argued for a hundred years, and certain justices of this court have argued from time to time, always in dissenting opinions, that it was incompetent for a state to contract on this subject; impossible for one legislature to bargain away the right of future legislatures to tax as they please. But this court has held uniformly that it was competent for a state legislature to make such contract. These decisions, we think, must be adjudications to the effect, that the courts cannot say that such contracts fairly entered into are contrary to a constitutional provision requiring uniformity of taxation; for as before stated, there is probably not a state constitution under which uniformity is not required.

In *State of New Jersey v. Wilson*, 7 Cranch 164, the legislature made a settlement with Indians, by which the Indians released certain lands to the state and certain lands were purchased by the Indians with a provision that they should thereafter be subject to no tax. This was held to constitute a contract which could not be rescinded by subsequent legislation. We know of no subsequent de-

cision in this court questioning this case and think it has been uniformly followed.

In *Gordon v. Appeal Tax Court,* 3 How. 133, the legislature of a state accepted from a banking corporation a payment as a consideration for the franchise granted, with a provision that the state was not to "impose any further tax or burden upon them during the continuance of their charter under this act." Held: to be a contract which the legislature had power to make and which could not be subsequently repealed.

In *State Bank of Ohio v. Knoop,* 16 How. 369, a grant was made of a charter to a bank, providing that no more than a specified amount of taxes should be levied on its property during a term of years. This court held that this was a contract binding on the state, reversing the supreme court of Ohio which had decided to the contrary. This case was followed by *Jefferson Bank v. Skelly,* 1 Black which involved the same state of facts.

In *University v. People,* 99 U. S. 309, this court construed a grant of exemption from taxation made by the legislature of Illinois to Northwestern University and held that a later statute impaired the obligation of the grant of exemption. The case was a writ of error to the supreme court of Illinois and the state court had held that the original contract made in 1855 was invalid, because in conflict with the state constitution of 1848. The state court had held that the legislature in 1855 had no right under the state constitution to exempt any-

thing except property in immediate use for school purposes; but this court reversed that decision, holding the construction placed by the supreme court of Illinois on the state constitution was erroneous, and that the legislature had power to contract for exemption of *all* the property of the university.

In *Asylum v. New Orleans*, 105 U. S. 362, an institution for the relief of destitute females had been incorporated in 1853 by act of general assembly which exempted all the property of the corporation from taxation. A decision of the supreme court of Louisiana held, construing this exemption, that it did not include certain kinds of property, but this decision was reversed in this court.

V.

The alleged contract was acted on in good faith and executed. It has been treated as valid by all departments of the state government for thirty years and was never attacked until the passage of the act of 1895. *This long practical construction, the long continued payment of the gross earnings percentage, with the investments which have been made in the state, forbid that this construction should now be changed to the detriment of vested rights.*

Without considering for the present whether the court below is correct in its interpretation of the

state constitution as an original question, we wish to explain the history of legislation in Minnesota and show the *practical* construction, which the constitution has received from all departments of the state government; and also to state in a general way the vested rights which have accrued in reliance thereon.

The system, of providing for taxation of railroad lands through payment of a percentage of the gross earnings of the road in lieu of other taxes, was universally in vogue in Minnesota in territorial times, and after the admission of the state and the adoption of the constitution in 1858 the Legislature invariably assumed that it continued to possess the same power, whether the railroad grant was the absolute property of the state, or was public land of the United States. This was the practice not only as to old grants adopted before the constitution, but also as to new grants both state and congressional made after that date.

Confirmation and construction by the courts will be found in the cases cited under the last head. There we think we have succeeded in showing that the supreme court has repeatedly *sub silentio* and several times expressly decided,that this legislation was within the power of the legislature to pass. The Parcher case and the decisions following it, which we have cited under the preceding head, have universally been regarded as the law of the state until the decision in this case. It is unnecessary to dwell on the fundamental importance and sacredness of the rule of property so established.

To show the course of legislation on this subject after the adoption of the constitution, we cannot do better than to quote from the opinion of the supreme court of Minnesota in *State v. Luther,* 56 Minn., pp. 163-4:

> "Among the congressional grants made subsequently to the adoption of the constitution to aid in the construction of railroads in this state, are the act of March 3, 1865, (13 U. S. Stat., p. 526), increasing the grant of 1857 to ten sections per mile; the act of May 5, 1864, (13 U. S. Stat., p. 64), making a grant to aid in the construction of a road from St. Paul to Lake Superior; the act of May 12, 1864, (13 U. S. Stat., ch. 84, sec. 7, p. 74), granting four additional sections per mile to aid in the construction of a road from St. Paul and St. Anthony to the southern line of the state; the act of July 4, 1866, (14 U. S. Stat., p. 87), making a grant to aid the construction of what is called the Hastings & Dakota Railroad; the act of July 2, 1864, (13 U. S. Stat., p. 365), making a grant directly to the Northern Pacific Company to aid in the construction of its road.
>
> "Among the grants made by the state itself for like purposes were that of March 6, 1863, (Sp. Laws 1863, ch. 4), of swamp lands to the St. Paul & Pacific Company to aid the construction of a road from St. Paul to Winona; the act of February 16, 1865, (Sp. Laws 1865, ch. 1), granting swamp lands to aid the construction of the Southern Minnesota Railroad; the act of March 8, 1861, (Sp. Laws 1861, ch. 1, sec. 18), making a grant of swamp lands (to which the lands here in controversy in part belong) to aid in the construction of the road from St. Paul to Lake Superior.
>
> "And in every instance the legislature, in making or transferring the grant to the railway company, provided for the exemption of the lands from ordinary taxation while owned by the company, in consideration of its pay-

ing to the state, annually, a certain percentage of the gross earnings of the road. They provided for the same system of taxation for the Northern Pacific Company, which received its grant directly from Congress. Sp. Laws 1870, ch. 65, sec. 1.

"In brief, the legislature assumed that when making a grant of lands to aid the building of a railway, or in executing the trust where lands had been granted to the state by congress for the same purpose, (and which, while thus held by the state, either as proprietor or in trust, were, of course, not subject to taxation), it had the power, in the furtherance of the object for which the grant was made, to exempt such lands from ordinary taxation, and to provide for commuted taxation of both the railroad and the granted lands.

"There is not in the history of the state a single grant of lands to aid the building of a railway, where this system of commuted taxation has not been adopted, and we have not found an instance, prior to the adoption of the constitutional amendment of 1871 (Const., Art. 4, sec. 32a) where a commuted system of taxation was provided that did not apply to a land grant as well as to the railroad property. This amounted to a legislative construction of the constitution, which of itself would be entitled to great weight."

The original and largest land grants in Minnesota had been created by congress in 1857, the same year during which the Minnesota convention was sitting discussing the constitution of the proposed state and during which that constitution was finally adopted. The state was admitted in 1858. The men who framed the constitution were among the most eminent in the state; the convention was composed largely of leading lawyers

and subsequent judges and legislators; these men as well as the people knew only of taxation of railroad land grants by gross earnings; there was not a previous grant taxed in any other way; the framers of the constitution were afterwards legislators, judges and executive officers of the state; these very men at once upon the admission of the state commenced to pass laws conferring land grants on railroads on terms as to taxation precisely the same as theretofore in vogue. A number of these laws are mentioned in the extract above quoted from the opinion of the court in *State v. Luther*; but this enumeration might be largely added to. Note for example the series of laws contained in special laws of Minnesota 1865, chapters 1 to 10 inclusive. It never occurred to the legislators, many of whom had been in the constitutional convention, that these laws were obnoxious to the state constitution. As the supreme court well says in the case last cited, "This amounted to a legislative construction of the constitution which of itself would be entitled to great weight." And when we find the courts, as heretofore shown, sustaining as valid contracts, not only state regrants of forfeited territorial franchises, but state original grants, this legislative and judicial construction must be considered to have settled conclusively and forever, that such grants were not obnoxious to the constitution.

The same class of legislation was extended to other subjects besides railroads and railroad land grants. In the first tax law passed after the adop-

tion of the constitution (chap. 1, Gen. Laws 1860) the legislature in section 2 made a provision by which the tax payer could offset against the assessment of credits any indebtedness which he might owe. Although this provision would be unconstitutional according to a technical and literal reading of section 3, article IX *supra*, and had been so decided in Ohio before we adopted the section (*Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1) it has always remained a feature of the tax laws of Minnesota. It has been in force and universally acted upon for 39 years. And in *State v. Moffett*, 64 Minn. 292, the constitutionality of the act being challenged, the court declined to consider the subject upon its merits, or to indicate what conclusion might be arrived at if the question were an open one, saying:

> "We regard the point submitted as foreclosed by the practical construction which has been placed upon sections 1 and 3 of article IX for almost 40 years, really during the entire period of statehood, by the legislative, executive, and judicial branches of the state government."

The court goes on to show that in 1860 such a provision was introduced into the tax law, where it has always remained; that in 1864 the attorney general of the state rendered an opinion that the law was unconstitutional, but notwithstanding this opinion the executive department of the state had always recognized the validity of the law, the legislative department had gone on the theory that it was valid, and it had silently been taken for

granted in the judicial department; and that in this construction the people of the entire state had acquiesced for nearly two score years.

It thus appears as if in the state court 40 years of practical construction is sufficient to make valid one class of legislation; and not sufficient to make valid another class of legislation, the objection being the same against both and the practical construction being the same in both cases. There is really no difference between the two cases except the inclination and desire of the state court to hold one piece of legislation valid and the other piece invalid.

In 1872, amended in 1876, the legislature of Minnesota passed an act for the taxation of insurance companies by a percentage of premiums in lieu of other taxes on all real and personal property (see Gen. Stats. 1878, sec. 315, p. 433). Taxation of insurance companies by the same method has prevailed ever since without question and goes on in the state of Minnesota today.

Mining companies were taxed under the law of Minnesota according to the tons of ore mined, and this was held unconstitutional in the case of *State v. Lakeside Land Co.*, 71 Minn. 283. But there had been no such long practical construction of the law as to mining companies. The law was a general law. There was no question of contract involved, the law not taking the form of a contract and no investment having been made in reliance thereon. And moreover, the tons of ore mined is no sort of criterion to the value of a mine, as the earnings of

a railroad are a criterion of the value of a railroad. This last suggestion will be further considered under the next point.

Thus we have in Minnesota a system of railroad taxation of 40 years' standing, a system of taxation of credits nearly as old, a system of taxation of insurance companies 25 years old, the validity of which has passed unquestioned until quite recently. Not only the legislature, but the executive, the courts and every branch of the state government, and the people themselves, have during all these years considered this legislation as valid. The controlling force of a long continued practical construction of this sort is held in a line of decisions in the supreme court of Minnesota. *Carson v. Smith*, 5 Minn. (Gil.) 61; *Green v. Knife Falls Boom Corp.*, 35 Minn. 161; *City of Faribault v. Misener*, 20 Minn. (Gil.) 352; *Ames v. Railroad Co.*, 21 Minn. 288; *State v. Moffett*, 64 Minn. 292; *State v. Luther*, 56 Minn. 156, 162.

The cases are also numerous in this court, where it has been held, that co-temporaneous interpretation of a constitution practiced and acquiesced in for years conclusively fixes its construction. *Stuart v. Laird*, 1 Cranch. 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Cooley v. Port Wardens*, 12 How. 299; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53; *The Laura*, 114 U. S. 411.

As the court forcibly put the matter in *U. S. v. Burlington Ry. Co.* 98 U. S. 334:

"Such has been the uniform construction

> given to the acts by all the departments of the government. Patents have been given, bonds issued, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot at this day be called in question."

As shown by the opinion of the Minnesota supreme court in *State v. Luther*, the provision here claimed to be unconstitutional has been incorporated into every railroad grant ever made in Minnesota. These grants have been accepted in good faith and enormous sums of money have been invested in reliance thereon. It appears in the record that the Northern Pacific Railroad was built through the state of Minnesota (about 250 miles) in reliance thereon, built it is not unreasonable to assume long in advance of the possibility of profitable operation; years ahead of the time when it would have been built except for that and similar inducements. The state has been populated, its interests developed, its property made valuable by the construction of this and other railroads, and investors cannot now be put in *statu quo;* the state cannot refund what was invested in reliance upon a construction of the constitution, which the court now says 30 or 40 years afterward was incorrect. The roads have during all these years paid into the state treasury three per cent annually of their gross earnings, state and interstate, though the power to tax interstate earnings is and always has been doubtful (*McHenry v. Alford*, p. 670). The state

does not propose to refund. And the law of 1895 continues the obligation to pay the same gross earnings assessment. Negotiable bonds have been issued secured by mortgages on these railroads and have been dealt in by the commercial world in reliance on the validity of these contracts, and their validity was never challenged until in the year 1895, when the legislature passed the tax act in question.

Not only should this court follow its own judgment as to the constitutionality of the laws of 1865 and 1870, but considering the long practical construction and the large investments in reliance upon that construction, the case falls within those decisions of this court, which have held, that, where when contracts are made, the law of the state as interpreted by its courts is in favor of their validity, a subsequent decision of the state court to the contrary will not be followed in this court; *Gelpcke v. Dubuque*, 1 Wall. 175; *Thomson v. Lee*, 3 Wall. 327; *Mitchell v. Burlington*, 4 Wall. 270; *The City v. Lamson*, 9 Wall. 477; *Douglass v. Pike*, 101 U. S. 677.

VI.

As to the true construction of sections 1 *and* 3, *article IX of the state constitution.*

Section 1 does not differ from the provision in the organic act of the territory of Dakota, which was construed by this court in *McHenry v. Alford*,

168 U. S. 651. The organic act provided that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

This language in the organic act of North Dakota contained two prominent limitations on legislative power; first, that taxes should be uniform, second, that they should be in proportion to the value of the property taxed. The organic act therefore contained all the provisions of sections 1 and 3, article IX, of the Minnesota constitution, except the one provision of section 3, to the effect that laws shall be passed taxing all property.

This court held in that case that there was nothing in this provision of the organic law, which prohibited the legislature from passing a gross earnings law, under which the railroad company paid a percentum of its gross earnings in lieu of all other taxes on the railroad and land. The case decides (a) that such a law provided for taxation not exemption (b) that such taxation is not contrary to the rule of uniformity; (c) that the taxation is *in proportion to value*. So far as the opinion of the supreme court of Minnesota in this case (72 Minn. 22) holds that the act of the legislature violates the constitutional rule of uniformity, or so far as it holds that the taxation in question is not based on value, it is contrary to the decision of this court in *McHenry v. Alford*, and contrary to the authorities which this court cited with approval, 168 U. S. 699.

And when the state court says that a state could not *contract* it runs counter to the settled rule in this court, which we have before referred to, that a state can make a contract on the subject of taxation.

Possibly the decision of the state court may rest partly upon that part of section 3 which says, "Laws shall be passed taxing *all* moneys," etc., and also, "*all* real and personal property according to its true value in money." But it is clear, and has been decided by this court in *McHenry v. Alford*, that the legislature may classify and arrive at the value of different species of property in different ways: it may for example tax improved property by percentage on rental or income, unimproved property directly by ascertaining its value.

Section 1 says, that the legislature may select the property which is to bear the burden of taxation and need not levy taxes on all property. If section 3 is to be read literally and strictly so as to compel the passage of laws taxing absolutely *all* property, it conflicts with and is contradictory of section 1.

But the two sections stand in the constitution together as both operative and as modifying each other. Some construction must be adopted which will give the fullest effect to both.

It may be pertinently pointed out that section 3 is not self-executing but is directory to the legislature. It says that laws shall be passed etc. Suppose the legislature fails to pass any law taxing mortgages, for example, it could not be contended

that mortgages were taxable. Neither, we apprehend, would a court decide that all the taxes assessed in the state were void because the legislature had not passed a law taxing mortgages. *State, Vail's Exrs. v. Runyon,* 41 N. J. Law. 98. And therefore it may well be held that section 3 was not intended to overrule section 1 so far as concerned the power of the legislature to determine where the burdens of taxation should be placed (of course, without unjust discrimination) and to classify property into different classes for the purposes of taxation.

The utmost that can be claimed by the learned attorney general is that there are three important requirements as to taxation in the Minnesota constitution; (a) that laws should be passed by the legislature taxing all property (b) that taxation shall be based on value (c) that it shall be uniform.

(a) That these laws comply with the first requirement is not doubtful. They tax the property and do not exempt it. This was decided by this court in *McHenry v. Alford.* It has also been decided by a uniform line of cases in the supreme court of Minnesota. In the Parcher case the court distinctly overruled the argument that the grant was an exemption and without consideration, and said that it was a franchise or right based on a sufficient consideration; namely, the agreement to construct the road and to pay perpetually 3 per centum of the gross earnings thereof. In *City of St. Paul v. St. Paul & Sioux City R. R.*

Co., 23 Minn. 469, the court said that the statute should be liberally construed, because it was not an exemption statute, but merely provided a mode of commutation of taxes, which was equally advantageous and beneficial to the state, as direct ordinary taxation; that this method of taxation was adopted because it would prove less vexatious and burdensome to the companies and ultimately more advantageous and productive of revenue to the state, and clearly more just and equal to all localities thereof. In *State v. Winona & St. Peter Co.*, 21 Minn. 472, the court said that the 3 per cent was provided as a commutation for taxes and that this commutation was one of the inducements held out to the company to undertake the enterprise. In *County of Hennepin v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 33 Minn. 534, the court again said, that this was not an immunity from taxation, but a commutation of taxes, another and substituted way prescribed by law, in which the company, as owner of the land among other property, contributes its share to the public revenue. In *County of Ramsey v. Chicago, Milwaukee & St. Paul Ry. Co.*, 33 Minn. 537, 542, the court said: "It must be supposed that it was contemplated, that this system would, upon the whole, fairly effect the objects of taxation with respect to such corporations, and be equivalent in its results to taxation of the property owned by them." Again, the court said in *County of Todd v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 38 Minn. 163: "That the purpose of such taxation is to secure to the

state its proper revenue from the taxable property of these corporations." In *St. Paul v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 39 Minn. 112, the court again repeated that these charters did not exempt the property from taxes, but provided a substituted method of taxation, based upon the assumption that the property of the companies was to be used for railroad purposes, and thereby an income be derived, the percentage of which, received by the state, would be equivalent in its results to the ordinary taxation of the property. Again in *County of Martin v. Drake*, 40 Minn. 137, it is said, that the percentage of gross earnings paid by the company is merely the equivalent of a tax it would have to pay, had a tax in specie been assessed. Finally, the supreme court of Minnesota said in *Marr v. Luther*, 56 Minn. 156, 160: "It is a common error, in construing statutes like the present, to assume that because the commuted tax is fixed with reference to, and is wholly derived from, the gross earnings of the road, therefore the lands are exempted from taxation altogether. The percentage of the gross earnings is paid as taxes on both the railroad and the granted lands, and, although derived wholly from the former, is a commutation tax alike on both." Again the court pointed out in the same case (on page 162) that there is nothing in the suggestion that these laws are unconstitutional as to the land grant but valid as to the railroads. The court said that the laws must be all valid or all void, first, because the gross earnings tax was a tax on both the road and the

land, and secondly, the vice, if there be one, in the commuted system of taxation, would apply to one class of property as well as the other; and if there is anything in the point both classes of property, namely, the railroads themselves and the land grants, must under the constitution be taxed directly by assessment according to their true value in money.

This court decided distinctly the same thing in *McHenry v. Alford.*

Therefore, it is not open to debate

that the laws in question are not exemption laws and do tax the land. Therefore they comply with the requirement of the Minnesota constitution, that laws shall be passed taxing all property.

(b) Next, the taxation is based on value. This proposition is also held in the cases before cited, both in the decisions of the supreme court of Minnesota and in the decision of this court in *McHenry v. Alford.* The question was fully and elaborately argued in *McHenry v. Alford* and the decision there made is correct in principle.

There are certain classes of property, notably property devoted to a public use and operated under franchises, like the property of a carrier, the value of which can be best ascertained by earning capacity. Note what this court said as to ascertaining the value of a railroad in *Smythe v. Ames.*

Take, for example, a railroad; it has no market value; there are no purchasers; so much money may be invested in it that no person or aggregation of persons would furnish the

capital to buy it. Yet it has a value as a system or entity which can best be determined by its earning capacity. The same is true of any property incapable of separation from franchises with which it is used, the whole constituting a taxable entity with a value depending on earning capacity, or at least which the legislature *may* determine by earning capacity. And the legislature is not confined to taxing such property by direct assessment of such part thereof as is tangible and has an ascertainable market value. *McHenry v. Alford*, pp. 665-668; *Adams Express Co. v. Kentucky*, 166 U. S. 171; *Adams Express Co. v. Ohio State Auditor*, id. 185.

Mr. Morawetz, in his work on Corporations Section 929 says:

> "In speaking of the value of franchises, care must be taken to distinguish between the different meanings of the word 'value.' One meaning of the word is *price*, or the amount for which a thing can be sold. In this sense franchises have clearly no value whatever, because, by their nature, they are not transferable. They cannot be sold, or leased, or mortgaged, nor can they be taken on execution. On the other hand, franchises clearly have a value, if the word 'value' is used to signify the advantage derived from their possession, or, in other words, their utility. The value of a franchise, using the word 'value' in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession."

The determination of value by rental or income can not, we submit, be held not to be a constitu-

tional assessment according to value. It is an elementary principle of political economy that rental or earning capacity is one of the very best tests of value. And in order to hold that taxation of a railroad by an annual percentage of gross earnings is not taxation of the property according to its value,the court must overrule this fundamental principle and say,that earning capacity may not be taken as a test of the value of property difficult or impossible to determine directly. The court must hold the very narrow view that no appraisal is based on value, except the ordinary direct and specific assessment of value; when we all know, as a fact, that as to all property operated under and with franchises earning capacity is the best index of value.

If this is true with respect to taxation of railroads it is true of the taxation of these land grants as a single entity with the railroad. These grants were universally granted to aid in the construction of some railroad. Take the Northern Pacific grant as an example. Its lands were granted by section 3 of the act of July 2, 1864. "For the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores." The lands were held upon a trust created by act of Congress for the purpose of aiding the construction of the railroad. Neither the lands nor their proceeds could lawfully be applied or used for any other purpose whatever. While held on this trust they could

not be made productive; they could not be built upon, cultivated, improved, and made a source of income to the company; they were necessarily held for sale, the proceeds of sale to be devoted to railroad purposes strictly, and to paying off mortgages, the money raised upon which had constructed the road. The lands could not be sold and the proceeds appropriated by the stockholders in the way of dividends or otherwise. They are wedded to and inseparable from the railroad itself. Without them coupled with the commuted taxation, the road might not have been built. The railroad earnings are produced partly by the lands, because the value of the lands has already been borrowed thereon and put into the road; the lands are and must continue to be held to aid the road and enable it to produce earnings. *McHenry v. Alford*, pp. 660, 661, 662; *State v. Luther*, 56 Minn. 156.

We are not, therefore, asking the court to hold that the Minnesota legislature could exempt any property from taxation. We can safely concede, that it is the duty of the legislature under the constitution of the state, to tax all property at its value in money. But here we have a kind of property which is *sui generis*, consisting of a franchise, with a land grant devoted to the purpose of building a railroad; the whole consisting of one entity, upon which it would be difficult—if not impossible—for any person to put a direct value in money. Instead of trying to do so the legislature has said that the whole shall be assessed each year by taking 3 per cent of the gross earnings. Under this sys-

tem, as the earnings increase taxes increase, and it is fair to assume that as value increases earnings increase. It cannot be said that this property is not taxed, neither can it be said that it is not taxed in proportion to its value. All that can be said is that the value is ascertained indirectly instead of directly. But it was for the legislature to fix the *method* of ascertaining value. There is nothing in the constitution which provides that value shall in all cases be fixed by a direct determination by an assessor, and if the *method* of taxation here in question may be regarded as resting on *value*, the selection of such *method* of arriving at value is purely a legislative question. Plainly it may be the case that this property has and would continue to pay substantially the same, or at least as much taxes, under the gross earnings system as under the other system. We believe railroad experience has shown this to be the case, but whether this is true or not the crucial question is whether the court can judicially know, that this taxation has not been in proportion to value; or whether on the other hand this is not purely a legislative question.

(c) As to the requirement of uniformity, it was decided by this court in *McHenry v. Alford*, that the taxation in question was not contrary to the requirement of uniformity. The only refuge of our opponents is to say, that while the taxation in question might be uniform for one year, its uniformity is destroyed because the legislature has fixed the rate of taxation for a considerable number of years, or so long as the company holds the lands unsold.

The learned attorney general will, we think, be driven to concede that the property is taxed and that it is taxed on value; that the rule of uniformity is not violated unless it be on account of the rate of taxation being fixed for a considerable period. And this is the point to which this part of the case is ultimately reduced as shown by the recent opinion of the supreme court of Minnesota (unreported) in *County of St. Louis v. Duluth and Iron Range Railroad Company*, where the court says:

> "True, these lands were conveyed for a public purpose and it may be conceded that in the absence of constitutional provisions prohibiting it, the legislature might in aid of such purpose have granted the lands exempt from taxation. But we are of opinion that under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes and apply them in advance to a specific public purpose, still, it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation."

This argument concedes *that the laws in question were valid as laws and provided for valid taxation for the time being. It bases their invalidity entirely on the contract feature.*

There are several answers to the argument.

First, the legislature is not confined by the constitution to fixing a new rate of taxation every

year. Neither is there, as we think, any provision in the constitution which requires that the legislature shall fix the rate on *all* property at the same time, or for the same term. May not the legislature fix the rate on land for five years to come and leave the rate on personal property to be fixed annually? Would that be contrary to the rule of uniformity? It must be remembered that the legislature is vested with all the power on this subject, except as it is limited by express constitutional limitation. General legislative power rests in the legislature and it may fix the valuation and rate itself, or delegate such fixing to subordinate bodies. The legislature must be the judge (unless it is expressly deprived of that power) as to whether fixing the rate of taxation with respect to a certain class of property for a considerable term violates the rule of uniformity, because the rate on other classes of property is fixed annually or bi-ennially. How can the court say that thereby less taxes are collected against the property for which the rate is fixed for a long term? In fact all the legislature has done is to classify; the classification rests on reasonable grounds, and so far as appears all members of the class are taxed alike. *McHenry v. Alford*, 168 U. S. 651; *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U. S. 232; *Home Insurance Co. v. New York*, 134 U. S. 594; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Adams Express Co. v. Ohio*, 165 U. S. 194, 228.

Next, when we consider the history of Minnesota, it is little short of absurd to suppose, that these sec-

tions of the constitution *required* the legislature to tax railroads by direct assessment, as other property is taxed. We have already referred to the fact that before the constitution was adopted several railroad companies had been chartered and the great congressional grants made in 1857 had been parcelled out; every charter and every grant containing an irrepealable contract provision, without any power reserved to amend or repeal, for taxation both on the railroad and grant by 3 per cent of gross earnings in lieu of all other taxes. The men who framed the constitution and who formed the first legislatures of the state well knew of this condition, and by section 1 of the schedule attached to the constitution provided:

> "That no inconveniece may arise by reason of a change from a territorial to a permanent state government, it is declared that all rights, actions, prosecutions, judgments, claims and contracts, as well of individuals as of bodies corporate, shall continue as if no change had taken place."

The constitution thus fastened upon the state the gross earnings system, at least as to a large number of railways and land grants.

And an amendment to the constitution, adopted April 15, 1858, provided for loaning the credit of the state to railroad companies and the issuing of Minnesota state railroad bonds. This provision of the schedule and the said amendment are what the supreme court of the state principally relied upon in the Parcher case, in reaching the conclusion that

the state was bound by the gross earnings contracts and had a right to re-grant franchises and property forfeited to the state. The framers of the constitution and the early legislatures well knowing, that many of the principal railway companies had irrepealable contracts with the state providing for gross earnings taxes, said in the constitution, *not that no more such contracts should be made, but that taxes should be uniform.* How could they have conceived that uniformity was to be secured except by taxing subsequent companies in the same way as those previously organized? That they so intended is sustained by the after history of the state, as before shown. If the contention of the learned attorney general in this case is correct, we have the monstrous result that the framers of the constitution intended a part—and a large part—of the railway companies should pay perpetually taxes by a fixed gross earnings percentage, and the companies competing with them, parallel with them, should pay taxes on a different basis at the will of the legislature. The Great Northern company operates the lines of the former St. Paul and Pacific and is perpetually entitled to pay in taxes only 3 per cent on its gross earnings, while the Northern Pacific company, its chief competitor, if the argument is sound, is bound to subsist on the same tariffs and on business derived from the same territory, and is obliged, as proposed in this law, to pay 3 per cent on its gross earnings plus ordinary taxes on all its lands; or may be compelled to pay taxes on any basis the legislature may fix. Is this

what the framers of the constitution contemplated when they said that taxes should be uniform?

In the next place, as we think, the argument is overruled by those decisions of this court which hold that a state has power to contract with respect to taxation. From the beginning this court has held that such a power to contract was inherent in every state government; not because of either the presence or absence of any particular provision in the state constitution, either conferring power, or making a limitation on power; but because of the inherent sovereignty of the state. And it is a startling proposition at this day that a state has no power to make a contract. It would need some plain and explicit provision of the state constitution to accomplish that result. Here, it is sought to *infer* the want of this power, naturally inherent in the sovereign, from a provision in the state constitution that taxes shall be uniform. But if we have convinced the court that these laws do tax the property, that they tax it in proportion to its value, and that they are good as far as respects the requirement of uniformity *as legislation*, it follows necessarily that they comply with the constitutional requirement as to taxation; and if they were valid tax laws, and if the state had any power to contract, to say that the state had no power to make *this* contract is to say that it had no power to contract for valid taxes. If this tax was uniform compared with other taxes in 1865,these laws were valid tax laws, and this court held in *McHenry v. Alford* that such a tax did satisfy the requirement of uni-

formity. If the laws provided for uniform taxation in 1865, what is there to show that they would not at any future time secure uniform taxation? What the state court has decided is that the taxation is not uniform because of its *contract* feature; that is, that there might arise in the future such a condition of things as that, for the time being, railroad companies would pay less proportionately than other property holders might be required to pay. On the other hand we may suggest with equal reason that these laws may require at other times, or on the average, a payment by railroad companies in excess of what other property owners pay. But how can the court know judicially that these laws have or ever will work any discrimination? There is no suggestion in the pleadings or proof in the record that they ever have or ever will. The state court has decided that the laws are void because they may possibly do so. But is not this shearing the legislature of all legislative power? Was it not for the legislature to judge as to whether these laws would in the long run operate fairly and uniformly? The supreme court of Minnesota has in many of its earlier opinions said that these laws do work uniformly, equitably and beneficially, both to the companies and to the public. If the acts were valid tax laws and operated with uniformity as laws, it was for the legislature to say how long they would continue to operate with uniformity and whether any contract ought to be entered into on the subject. What we have said under a previous head with respect to the

decisions of this court, holding a state has the power to contract as to taxation, is applicable here.

Various decisions of other state courts have been made touching constitutional limitations on the power to tax more or less similar—some of them almost identical—to those in the constitution of Minnesota. We refer below to some of the cases, all of them having been called to the attention of this court in *McHenry v. Alford* and most of them having been cited in the court's opinion.

The constitution of Wisconsin provides: "The rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall prescribe." The question had been very much mooted and had been passed on or touched upon by different decisions of the supreme court from an early day, which decisions were not altogether consistent with each other. The question finally came before the supreme court of that state in *Wisconsin Central Railroad Company v. Taylor County*, 52 Wis. 37. It was elaborately considered by the court in its opinion, page 57, and subsequent pages, and the gross earnings tax upon railroad lands was held valid.

The constitution of Iowa (adopted 1846, sec. 30, Art. 3) declares "the general assembly shall not pass local or special laws * * * for the assessment and collection of taxes for state, county or road purposes * * * and in all * * *

cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state." Under this provision it was decided that an act of the legislature was valid, exempting all property, including the residences of professors, upon the grounds of literary institutions, and the dwellings of clergymen owned by religious societies, and used exclusively for such dwellings, without income to the owners. *Trustees of Griswold College v. Iowa*, 46 Iowa 275.

Section 1, Article II, of the constitution of Kansas, adopted in 1859, provides "the legislature shall provide for a uniform and equal rate of assessment and taxation." This is a very strong section, not only requiring uniformity of rate but equality of rate; but an act providing a different method of assessing and collecting taxes on railroad property than other property was held not to be unconstitutional. *Railroad Company v. Morris*, 7 Kan. 210. And in *Francis v. Railroad Company*, 19 Kan. 303, it was held, Brewer, J., giving the opinion of the court, that an act of the legislature providing for the collection of state taxes directly through the machinery of the state government, on railroad property in unorganized counties of the state, *where no other property was taxed*, was not in violation of this constitution.

The constitution of Louisiana provided "taxation shall be equal and uniform throughout the state. After 1848 all property on which taxes may be levied in this state shall be taxed in proportion to its value, to be ascertained as directed by law. No one

species of property shall be taxed higher than another species of property of equal value, on which taxes shall be levied." In *Louisiana State Lottery Co. v. New Orleans,* 24 La. An. 86, it was held that the lottery company might be exempted from ordinary taxation in consideration of its annual payment into the state treasury of a certain amount for the benefit of the school fund. And in *New Orleans v. Kaufman,* 29 La.An.283,it was held that the constitution did not prohibit the legislature from dividing the objects of taxation into different classes and imposing different taxes on each class. It merely required that the tax on each member of the same class should be the same. See also *New Orleans v. Davidson,* 30 La. An. 554, and *New Orleans v. Fourchy,* 30 id., 910.

The constitution of Michigan adopted in 1850, provided "the legislature shall provide a uniform rate of taxation except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." And section 12 said "all assessments hereafter authorized shall be on property at its cash value." In *People v. The Auditor,* 7 Mich. 84, an act of the legislature of 1853, remitting certain taxes for the term of five years to the contractors of a ship canal under a land grant to aid the canal, was held valid, Martin, C. J., saying:

> "This provision of the constitution has no reference to the power to exempt or to remit taxes, which is, and necessarily must be, to a great extent, left to the discretion of the legislature. * * * The legislature has the pow-

> er of prescribing the subjects of taxation and of exemption, but it cannot arbitrarily tax property according to locality, kind or quality without regard to value, but in this respect it must act by uniform rule. But to exempt property as is done in the case of church, school, or library property, or to remit taxes for any cause, has nothing to do with the uniformity of the rule of taxation. Pages 90, 91."

Manning, J., said also:

> "There is nothing in the constitution in express terms inhibiting the enactments of the law by the legislature * * * The two sections taken together mean that all descriptions of property *subject to taxation* shall pay such proportion of a tax as their cash value bears to the aggregate cash value of the whole property subject to the tax."

And the judges agree that it was competent for the legislature to exempt the lands from taxation for five years. See, also, the opinion of the court by Judge Cooley in *Youngblood v. Sexton*, 32 Mich. 406.

The constitution of New Jersey, adopted in 1875, provided "property shall be assessed for taxes under general laws and by uniform rules, according to its true value." Under this provision it was held that an act exempting mortgages from taxation, except under certain conditions, was constitutional. *State, Vail's Exrs. v. Runyon*, 41 N. J. Law. 98.

Section 1 of Article 9 of the new constitution of Pennsylvania, adopted in 1873, provides, "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under

general laws; but the general assembly may, by general laws, exempt" certain property named. In *Kittanning Coal Co. v. Commonwealth*, 79 Pa. St. 100, it was held that an act taxing coal companies on their franchises according to the amount of coal mined is constitutional. Agnew, C. J., said, in the opinion of the court:

> "Clearly there is nothing in this (constitutional provision) prohibiting the power to classify. Will it be argued that persons or the owners of property cannot be classified? For example: can it be said that all single freemen cannot be required to pay a uniform tax? Or that the owners of horses or mules or of cattle cannot be taxed upon their horses, mules and cattle at a certain rate? Or that the owner of unseated lands, or farms, or mills, or houses and lots cannot be taxed at a uniform rate? What difference is there between saying that all horses and mules shall be taxed at a certain rate and saying that the owners of these horses and mules shall be taxed at the same rate upon them? The distinction is evidently unmeaning. Persons pay taxes, not property. This is so even when the remedy for the recovery of the tax is *in rem*. The law only takes hold of the property as a means of enforcing the duty of the person. When the constitution enjoins uniformity of taxation, it is because of the right of the citizen, not of a right possessed by his property. * * * Hence, when the constitution said that all taxes shall be uniform upon the same class of subjects within a given territory, it did not mean to separate the property from its owners, or that property and not persons should pay taxes. This would be simply absurd, for inanimate things cannot perform duties. Taxes shall be uniform, because of the right of the citizen to bear no more than equal burdens. * * * But without the power to classify men, as well as things,

this undesirable inequality cannot be avoided; for if visible or tangible things only can be classified for taxation, then those whose wealth consists in that which is not visible or tangible, though it be far beyond the few visible effects of the poorer citizen, will not bear their proper share of the public burden. And among corporations or artificial persons the same result will take place. * * * But by classification this inequality between persons, natural or artificial, can be avoided. It is clear, therefore, that the moment we concede the power to classify, we have disposed of the question of uniformity, for then all that is required by the constitution is uniformity of taxes among the members of the class. * * * We must conclude therefore that a classification of coal mining and purchasing and selling companies is not beyond the legislative power, and the tax being clearly uniform upon their business measured by the extent of it, is not only within the meaning of the constitution, but is equal and just."

The constitution of Mississippi provided, "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." In *Mississippi Mills v. Cook*, 56 Miss. 40, a statute was sustained providing for the exemption of all factories "for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials."

The constitution of Illinois provided "the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property." But the exemption of the Illinois Central

Railroad Company from ordinary taxation in consideration of paying into the state treasury a percertage of its gross earnings was held valid in *Illinois Central Railroad Co. v. McLean*, 17 Ill. 291. In the case of *Hunsacker v. Wright*, 30 Ill. 146, it appeared that the charter of a city provided that its inhabitants should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for such purpose, and the property within the city should be exempt from taxes levied for county purposes; provided the city should support the resident paupers thereof, and pay the expenses of the circuit court in all criminal cases for offenses committed by citizens, and all jail fees accruing therefrom. The court held that while under the Illinois constitution the legislature could not exempt a person or community of persons from their share of the public burdens, still the legislature might commute a tax for an equivalent burden, and that in commuting the general assembly was the sole judge of the sufficiency of the equivalent to be received in lieu of the tax.

In Arkansas the constitution provided "all property subject to taxation shall be taxed according to its value—that value to be ascertained in such manner as the general assembly shall direct; making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." The decisions under this provision are quite numerous and for lack of space we merely refer to them. They will

be found to sustain our contention. *State v. Crittenden County*, 19 Ark. 360; *St. Louis R. R. Co. v. Berry*, 41 Ark. 509; *Arkansas Midland Ry. Co. v. Berry*, 44 Ark. 17; *Cairo Railroad Co. v. Parks*, 32 Ark. 131; *Memphis Railroad Co. v. Berry*, 41 Ark. 436.

VII.

We have presented the case thus far without any reference to the constitutional amendment of 1871, Art. IV, sec. 32a, which reads as follows:

> "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this state, or operating its road therein, or which may be hereafter organized, shall in lieu of all other taxes and assessments upon their real estate, roads, rolling stock and other personal property, at and during the time and periods therein specified, pay into the treasury of this state a certain percentage therein mentioned of the gross earnings of such railroad companies now existing, or hereafter organized, shall, before the same shall take effect and be in force, be submitted to a vote of the people of the state, and be adopted and ratified by a majority of the electors of the state voting at the election at which the same shall be submitted to them."

The gross earnings tax laws were in this amendment, confirmed by the people and put beyond the reach of amendment or repeal, without their consent.

In order to fully appreciate the force and effect

of this amendment, it is necessary to take into consideration the history of the state and the condition of legislation on this subject at the time it was made.

When the amendment was adopted all the railroads in Minnesota were paying a percentage of their gross earnings in lieu of all other taxation. There was no general law providing for this method of taxation, but each railroad was paying its taxes in this way by virtue of some special law in the form of a contract with the state. This method of taxing railroads had been inaugurated by the territory of Minnesota before the organization of the state. (Chap. 1, Laws of Minnesota, Extra Session of 1857). The territory, when granting charters to various railroads, had provided that the payment of three per cent of their gross earnings should be in lieu of all other taxation, and most of the railroad companies operating in the state in 1871 were organized under such territorial charters and paying their taxes under contracts made with the territory. A few railroads were paying similar taxes under similar contracts made with the state after its organization, one of which was the Lake Superior and Mississippi Railroad Company, the predecessor of the St. Paul and Duluth Railroad Co., and another the Northern Pacific Railroad Co. Prior to 1871, the state legislature had, at various times, at the request of the various railroads, reduced for a limited period the percentage of gross earnings which the railroad companies had thereto-

fore agreed to pay. (See chapter 2, Special Laws 1861, chapter 17, Special Laws 1862, and chapter 2, Special Laws 1863, as to Minneapolis & Cedar Valley Railway Co.; chapter 18, Special Laws 1862, chapter 1, Special Laws 1864, as to Root River Valley and Southern Minnesota Railroad Company and its successors; chapter 4, Special Laws 1864, chapter 6, Special Laws 1865, chapter 52 Special Laws 1870, as to the Minnesota & Pacific Railroad Company and its successors; and chapter 10, Special Laws 1865, as to the Winona & St. Peter Railroad Company, successor of the Transit Railroad Company).

In several of the decisions of the supreme court of Minnesota, which we have cited *supra*, these reductions of taxation, made by the consent of the state and the companies, were considered and held valid. The Parcher case was decided in 1869 holding, as we have before shown, that these provisions for commuted taxation were contracts, subject to the protection of the federal constitution and could not be changed against the consent of the companies. It must therefore have been well understood in 1871 that the legislature could not amend or modify these laws without the consent of the companies.

The amendment must be construed with reference to this condition and with reference to the evil sought to be remedied.

The supreme court of Minnesota in this case has adopted a view of this question, which we conceive to be contrary to the history of the state and con-

trary to the motive and intent of the amendment. The court decided that the amendment was intended to validate the laws *as laws only*, but disaffirm them as contracts and leave them subject to repeal by the people *without the consent of the companies.*

But an examination of the language of the amendment and a consideration of the history, and situation at the time which was that the people were dissatisfied with the reductions of taxation and with the amendments of the contracts, which the legislature and the companies had theretofore bargained for, shows, that the purpose of the amendment was not to modify or change the existing system, or any of the laws on the subject, but to confirm those laws and prohibit the legislature from any further arranging with the companies to tamper with them. It is also clear from the amendment that the people were satisfied with a gross earnings system and wished to take it away from the power of the legislature, even with the consent of the companies, to change that system for a direct tax system.

The laws were on their face laws making contracts, and there is nothing in the amendment, which indicates an intention, to take anything away from the laws as they stood, or from the binding force of the contracts plainly contained in them; the whole purpose expressed was to preserve them and put a check on their amendment or repeal by the legislature. There is nothing in the amendment to indicate, that the people intended

to assert their invalidity and the right to change them without the consent of the companies. What is apparent is, that they intended the legislature should not change them, even with the consent of the companies.

That such was the intention and that this is the construction which should be placed on the amendment appear more clearly when we take into consideration, that the amendment applies chiefly to laws passed by the territory, which all must concede were beyond all controversy binding, irrepealable contracts. The people must *at least* have understood that they had no power to repeal or modify the territorial contracts without the consent of the companies. The Parcher case had been then recently decided. As the amendment draws no distinction between territorial contracts and state contracts, it must be held to intend to affect both in the same manner; therefore to provide, not that the people could change these contracts at will without the consent of the companies, but that the legislature should not change them even with the companies' consent.

What the supreme court of Minnesota has in this case decided upon this point is, if we understand the previous decisions of that court, contrary to what it had decided in earlier cases. In *City of St. Paul v. St. Paul and Sioux City Railroad Company*, 23 Minn. 469, 475, the court said:

> "And the enactment of March 4, 1864, in this regard, has not only been uniformly recognized and acted upon ever since as valid by both the executive and legislative departments

> of the state government, but, by an express constitutional amendment, adopted in 1871, it has been placed beyond the reach of any amendment or repeal, except by a law ratified by the vote of the electors of the state."

In *County of Stevens v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 36 Minn., 467, 472, it was said:

> "The point that sections 1 and 3 of article IX of the constitution forbid this legislation was long ago settled in the Parcher case, above cited, and in the cases of *State v. Winona & St. Peter R. Co., supra*, and *City of St. Paul v. St Paul & Sioux City R. Co., supra;* it being held that those sections of the constitution did not prevent the legislature from modifying the terms of a provision for the payment of percentage of gross earnings in lieu of other taxation, in a case where that method of taxation had been established prior to the adoption of the constitution, and, in the latter case cited, that by the constitutional amendment of 1871 (section 32, article 4) such legislation had been confirmed."

Finally, in *State v. Luther*, 56 Minn. 156, 164, the court, in speaking of this amendment, used the following language:

> "This language must have been selected and this amendment adopted with reference to the existing legislation and the general legislative policy to which we have referred; and, read and construed in that light, it amounts to a clear recognition of the validity of existing laws providing for this commuted system of taxation of railroad property and lands, and of legislative power to enact such laws for the future. If it did not refer to this, there was nothing to which it could refer. It is, by necessary implication, a validation of past legis-

> lation of that kind, and a grant of power to enact it in the future."

If we understand the decisions quoted from, they hold that these laws were confirmed by the amendment according to whatever purport and effect the particular laws construed had. If they were only laws, they were confirmed as such; if they were laws making contracts, they were confirmed in their full effect.

As before shown, the principal companies and the principal land grants were in 1871 subject to irrepealable contracts with respect to gross earnings taxes. These contracts had been adjudicated in the Parcher case to be just as valid *as if they had been granted by the state legislature.* There is not we believe a syllable in any decision of the court or in any discussion, or in any public speech, or document issued at the time, to show that there was any doubt about the validity of such laws. These laws of the state, like the laws of the territory, professed on their face to be irrepealable contracts. There was no power reserved in the acts themselves to amend, alter or repeal, and no power was reserved in the state constitution. Therefore if the amendment of 1871 was intended to ratify or confirm anything, it must have been intended to ratify and confirm these acts *in the character which they professed on their face to have*; that is, as laws making contracts. On their face they were contracts. If confirmed at all they must have been confirmed as contracts. Or-

dinarily, as between private individuals, ratification must be of a thing in its entirety. One cannot ratify in part without ratifying in whole. And presumptively, even in the case of a state, where the state confirms, it confirms *in toto* and according to the whole intent and purport of the thing confirmed, making it in all respects as if power had existed in the legislature at its date. There is not a word or syllable in this amendment which affords any ground to suppose, that the people thought, when the amendment was passed, that these state laws were invalid and that they intended to validate them as laws simply and affirm their invalidity as contracts.

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